Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

In the Matter of	)	
	)	
Implementation of the	)	
Telecommunications Act of 1996	)	
	)	CC Docket No. 96-238
Amendment of Rules Governing	)	DA 97-2178
Procedures To Be Followed When	)	
Formal Complaints Are Filed	)	
Against Common Carriers	)	

GTE's COMMENTS

GTE Service Corporation on behalf of its affiliated domestic telecommunications companies

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GTE's COMMENTS

GTE Service Corporation, on behalf of its affiliated domestic telecommunications companies ("GTE"),[1] with reference to the Public Notice (the "Notice") released by the Common Carrier Bureau December 12, 1997 (DA 97-2178), offers the following comments:

BACKGROUND

The Commission's Report and Order in this CC Docket No. 96-238 ("D.96-238"), FCC 97-396 released November 25, 1997 (the "*Report & Order*"), adopted a number of proposals designed to revise the FCC's formal complaint rules to provide a forum for prompt resolution of all complaints of unreasonably discriminatory or otherwise unlawful

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[1] GTE Alaska Incorporated, GTE Arkansas Incorporated, GTE California Incorporated, GTE Florida Incorporated, GTE Hawaiian Telephone Company Incorporated, The Micronesian Telecommunications Corporation, GTE Midwest Incorporated, GTE North Incorporated, GTE Northwest Incorporated, GTE South Incorporated, GTE Southwest Incorporated, Contel of Minnesota, Inc., Contel of the South, Inc., and GTE Wireless, Products and Services, Inc.

conduct by telecommunications carriers, thereby "reduc[ing] impediments to robust competition in all telecommunications markets."[2] These rule changes are expected to "foster [the FCC's] ability to meet the statutory complaint resolution deadlines of the Telecommunications Act of 1996 (the "1996 Act") and expedite the resolution of all formal complaints, while safeguarding the due process interests of affected parties."[3] The *Report & Order* also encourages exploration and use of "alternative approaches to complaint adjudication", placing special reliance on the FCC's Enforcement Task Force (the "Task Force").[4]

DISCUSSION

I. Introduction and Summary

GTE applauds the Commission's continuing efforts to improve and streamline its procedures. GTE believes the Commission should be able to make its important policy decisions within a reasonable period with all due respect for due process, and offers its suggestions and comments in D.96-238 in this spirit.

The proposals of the Notice for accelerated procedures, however, raise grave concerns about whether they can be implemented in harmony with due process and indeed whether they will prove to be workable at all. It must be considered odd that, before even gaining any experience under the new streamlined procedures, a new set of super-streamlined and accelerated procedures are being proposed. GTE here offers

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2 *Report & Order* at paragraph 2.

3 *Id.* at paragraph 3.

4 *Id.* at paragraph 5.

its comments and suggestions as to how these concerns might be addressed, and urges thoughtful and thorough consideration of all these matters before the Commission plunges ahead. In GTE's view, if the accelerated minitrial approach is adopted without due consideration of these difficulties, it is likely to produce nothing more than unproductive increases in litigation costs for all parties.

GTE suggests the Commission should suspend its consideration of these proposals for the time being and make provision for reopening the question when it has a couple of years experience under its new streamlined rules adopted in the *Report & Order*.

Further, in light of decades of experience with innovations of this character before courts and administrative agencies at both the federal and state levels -- experience not discussed in the Notice, and in view of the special complexity and long history of jurisdictional conflict between federal and state authorities, and in view of the fundamental changes in relevant law effected by the 1996 Act -- many aspects still being tested before the courts -- GTE suggests the Commission should seek the advice of legal and constitutional experts on how questions of competition can best be addressed in harmony with due process.

II. If the streamlined procedures adopted by the Report & Order are applied successfully, there will be no need for the super-streamlined acceleration procedures proposed by the Notice.

The Notice (at page 3) asks about "1. Need for Accelerated Docket."

It is difficult to assess the need for accelerated procedures until there is some experience under the streamlined procedures already adopted in D.96-238. At this

date, these new procedures are not yet effective.[5] It appears likely to GTE that the new approaches adopted by the *Report & Order*, applied in a proper and even-handed way, will generally eliminate the stated rationale for an accelerated program of "minitrials". Indeed, if the Commission is able consistently to issue legally supportable decisions within the five-month target of the D.96-238 plan,[6] this would be such an enormous improvement over the past it would amount to a revolutionary change, a change that would generally accomplish the reform Congress presumably had in mind and make it unnecessary for the Commission to involve itself in the many problems discussed *infra* associated with the proposals of the Notice.

Assuming the Report & Order adopted sound procedures in D.96-238 and the FCC successfully applies those procedures in the future, there should be little need for a still more accelerated program. At best, such a program would be suitable for application to matters where the governing principle has already been resolved and it is merely a question of applying that governing principle to another case. But the authority to take this kind of action already exists in the hands of the Commission staff and has been actively employed for years.

Where new ground must be broken, where new policy must be created, it is fair and practical and legally required that the agency make its decisions based on a record developed in compliance with applicable rules of due process, and new policy decisions are to be made by the Commissioners.

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5 *Id.* at paragraph 345.

6 *Id.* at paragraph 1.

It must be stressed that by definition new-policy matters are not perfunctory cases; they are cases that do not automatically follow from policy already determined where the Bureau already has the requisite authority to decide. GTE must express doubts founded on experience that accelerated procedures are likely to accomplish a better result when it comes to new-policy matters, particularly in view of the immensely important ramifications likely to be associated with the creation of new policy.

III. The Notice does not address the reasons why effective and timely decision-making has not occurred in the past, and does not relate these proposals to either these reasons or grave and related procedural problems raised by Commissioners recently.

Continuing to address "1. Need for Accelerated Docket."

Absent from the Notice is any serious and critical discussion of why, under the very broad powers granted to the Commission even before the 1996 Act, and under the increasingly broadened powers granted to FCC Staff over the years, it has not been practical for the agency to issue legally supportable decisions concerning competition (and innumerable other questions) in a timely manner. Surely before adopting a broad new program over and above the so-far-untried D.96-238 procedures, the Commission should give consideration to what the practical problems have been and how these practical problems relate to the statutory role of the Commission and of Commissioners.

The 1996 Act made important changes in the law, but many elements have not changed. It is true today as it was in 1995 that the governing statute, the Communications Act of 1934 as amended (47 U.S.C. section 151 *et seq.*), places responsibility for policy determinations in the FCC Commissioners acting as a collegial body. Concern must be expressed about adopting new procedures that would move

the creation of new policy and, as a practical matter, move final decision-making down to the Staff level to an even greater degree than before. It would be most disturbing to take this action without considering thunderous controversies among the Commissioners just a few months ago concerning precisely these questions.

Recent, public and bitter controversies occurred among previous Commissioners as to the appropriate role of the Chairman vis-a-vis the Staff and the other Commissioners. What led to these controversies must be examined to determine their relevance to the proposals of the Notice, which would take still another step in the familiar direction of, as a practical matter, delegating broader effective power to the Staff. Just as a carrier should pay attention to customer complaints because such complaints provide an important signal of what may not be working, the Commission should -- now that the dust has settled and there are new Commissioners in place -- pay attention to what was alleged not to be working by persons certainly in a position to know (*i.e.*, Commissioners).

This should be done before initiating still another program in the very same direction, i.e., further shifts of effective power to the Staff. Specifically, there should be consideration of what bearing such a shift would have on the effective power of the Chairman vis-a-vis other Commissioners -- which was the issue at the heart of those recent controversies. It must be asked: Would this new program amount to a still greater isolation of Commissioners from the effective policy-making of the agency? If so, would this comply with statutory intent? Is this the direction in which agency action should be moving in light of the 1996 Act and important developments in administrative law and practice? None of these matters are addressed in the Notice (except implicitly

in its footnote 4, which is concerned only with discovery). Parties such whose knowledge of the 1996 and 1997 controversies among the Commissioners is generally limited to public statements are for that reason denied the ability to offer meaningful comments taking these matters into account with reference to the proposals of the Notice. It will not enhance the credibility of the proposals of the Notice if right at the creation of a new decisional mechanism the agency avoids grappling with central issues raised by these proposals.

IV. The Commission in the past considered the employment of paper proceedings a vast improvement in efficiency over live hearings; the Notice does not explain why the cited justification for putting aside live hearings would not be applicable to minitrials.

The Notice addresses "2. Minitrials."

What is not at all reflected in the Notice is that its proposals if adopted would represent a sharp and unexplained reversal of the agency's views on administrative efficiency. In terms of grappling with the difficulties of responsible, objective, and fact-based agency decision-making that is also timely and effective, the proposals of the Notice represent a profound shift in strategy. The FCC was a ground-breaking agency that persuaded itself and the courts that the practical and feasible method of decision-making in the dynamic environment of telecommunications was paper proceedings. And a key element in the agency's reasoning was the difficulty in dealing with due process requirements in live hearings.

There is no trace of these difficulties in the Notice, which suggests the direct contrary conclusion -- that live hearings conducted in accordance with due process

requirements would be more efficient than paper proceedings. The Notice does not explain why this improved efficiency would be limited to one subject matter, competition; or how the Commission will be able to continue using paper proceedings once they are identified as less efficient than live proceedings. Surely, to adopt such a view would require a reexamination of positions the agency has taken in the past and continues to take in court. The apparent path taken by the Notice is to ignore completely this important and complex area and the FCC's own history of determinations of comparative efficiency.

To what degree is the alleged greater efficiency of the acceleration proposals the result of assumed procedural unfairness? An adversary of a carrier may spend six months preparing a challenge that will implicate a vast array of factual and legal and constitutional issues. Under the proposals of the Notice, the carrier would be allowed a few days to respond,[7] and all other aspects of the "minitrial" would be accelerated accordingly. In such a case, since the tilting of the table against the carrier represent a clear violation of due process, the Staff would either to recognize this unfairness and make appropriate adjustments in its unreasonably accelerated schedule -- an action that would make hollow excessively optimistic assumptions about the benefits of the accelerated minitrial proposal.

If the FCC denies an adjustment of pleading deadlines sufficient to give the carrier a fair chance to present its case, the carrier will go to court. If this is done

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[7] In D.96-238, GTE argued strenuously, as did other parties, against the twenty-day requirement. If it is applied inflexibly in an unfair context it will wind up in court even apart from the minitrial proposals.

frequently, scheduling matters will be constantly coming to the Commission on an urgent basis and then going to the federal courts, which will issue injunctions to prevent denial of due process. This is one of the benefits, and one of the constraints, of constitutional government. If this keeps happening, it will stimulate judicial exasperation directed at all parties.

To make a realistic evaluation of what net benefits may result from adopting the accelerated minitrial proposal, the starting assumption must be that one way or another -- by action of the Staff or the Commissioners or the courts -- reasonable allowance will have to be made for the parties to present their cases. When this assumption is made, over-optimistic and naive predictions of swift resolution disintegrate.

For example, limiting to a few days the time of the carrier for filing an answer in a case where the complaint implicates a vast array of factual and legal and constitutional issues will, in the final analysis, not produce an accelerated proceeding. It will instead result in a scenario such as one or both of the following (further development of this scenario being limited only by the creative imagination of litigators): (A) Considerable Staff time being occupied with "traffic cop" functions, *i.e.*, under intense time pressure matching the time pressure imposed on litigants, Staff having to deal with requests for waivers or extensions of time or the like and/or appearances in court on multiple occasions to face an exasperated judiciary; (B) Increasingly the answers filed take on the character of a standardized form, and the real case is presented in subsequently filed documents of one sort or another.

The foregoing, or variations on it, would be the inevitable consequence of adopting the proposals of the Notice in light of the right of due process and its attendant

safeguards. Absent dictatorial power -- which the Commission does not wish to employ and would not be allowed to employ -- the FCC will have to be prepared to show to a court that under its rules as applied case-by-case there is essential fairness.

To require a complex enterprise with thousands of employees and hundreds of activities to respond to complex and important allegations in exceedingly short periods of time with potentially immense corporate interests at risk will not be tolerated by the courts and an attempt to take such action will not succeed. Thus, the assumptions of the Notice that matters of major importance will be decided even sooner than the five-month target of D.96-238 are built on sand.

V. A critical matter involving real time decision-making would be action on discovery.

The Notice addresses "3. Discovery."

A critical concern in modern litigation is discovery. The proposals of the Notice would put the FCC Staff in the position of having to deal with difficult discovery questions, and often under intense time pressure. It would not be good enough to reach an official of the agency after three days of calling, and then find he knows nothing of the subject and has to call someone else, and so forth. That will do for Staff purposes most of the time today, but if the Staff puts itself into the accelerated minitrial mode, and if there is to be any hope of maintaining the prescribed tight minitrial schedule and coming within hailing distance of due process, there will have to be someone on the Task Force with the requisite knowledge and authority available continuously on short notice to respond to requests and motions.

Should this person be a procedural legal type? Someone who would not have any great knowledge of the merits of the litigation but is a good traffic cop? This has the benefit of shielding the working Staff from the need for involvement in a steady flow of procedural questions. And a good traffic cop would be able to throw out -- or browbeat a litigant into withdrawing -- unreasonable demands as well as unreasonable denials of data. But someone who is only a traffic cop has a weak understanding of the underlying merits. That may affect the quality and timeliness of decisions. But the traffic cop could serve a beneficial purpose in getting rid of many of the sillier papers lawyers exchange.

Adopting unrealistically short time periods increases the need for flexibility in the system and its operation to deal with the particular case where fairness and due process requires more time. This means there must be a specific and reachable person who can respond to requests and petitions and motions quickly. It is questionable efficiency to take a Commission Staff person who is engaged in the substance of Commission decision-making away from that most important responsibility and involve him in procedure-related activities, though to some degree this may be unavoidable. Continuity is tremendously important in dealing with FCC controversies even in a procedural sense, for changing one date may necessitate changing three others. The Notice gives no indication that these practical problems are being given careful consideration.

VI. The Notice does not discuss the parallels of the proposals of the Notice and the Bureau's characteristic avoidance of the Administrative Law Judge mechanism.

In line with its general approach of avoiding tough questions, the Notice does not discuss the Administrative Law Judge parallel. For many years the Commission in the Common Carrier area has avoided use of the ALJ mechanism. The Notice never discusses why this is the case and why the problems with ALJ hearings do not apply to the proposals of the Notice, which are in many ways similar (a defined set of decision-makers hearing the merits of an orally presented case and writing a recommended decision).

If the Notice is assuming greater procedural flexibility than in the case of matters designated for hearing before an ALJ, surely that should be frankly explored and discussed. As discussed *supra* in the case of discovery, the acceleration of schedules for litigant action reflected in the Notice would stimulate requests for extensions of time or waivers or other procedural matters, particularly in association with discovery (discussed *supra*) as various dates interrelate, *e.g.*, giving the party that asked for documents adequate time to look at them before having to go into a live trial. The same question arises as in the case of discovery: What level of FCC person should be responsible for this? Drawn from which part of the Staff?

The classic ALJ has little or no continuity or background in terms of the subject matter. But the ALJ is an expert in procedural niceties that harried Bureau Staff has little time for. The Notice indicates no consideration of these questions.

The activities likely to follow from the Notice -- which does not contemplate an ALJ -- would get key Commission personnel heavily involved in the details of time-

consuming "judicial" decision-making and related due process requirements. This would take active Bureau Staff officials who have immense responsibilities out of their offices for extended periods. If, to avoid this, the FCC goes toward the ALJ-type alternative, *i.e.*, entrusting decision-making to someone without subject-matter continuity (who therefore has to spend a lot of time to attain familiarity with the context of the problem), this raises the factors that have impelled the Commission to avoid the ALJ mechanism for years. Surely any serious address to workable alternatives must address these considerations.

VII. Efforts to encourage parties to settle can be implemented a number of ways without adopting the proposals of the Notice.

The Notice at page 5 addresses "4. Pre-Filing Procedures." as well as "6. Status Conferences."

While the proposals of the Notice (at page 5) seek the benefit of inducing settlement of disputes, the FCC Staff even without a formal mechanism can call on the parties to enter into negotiations. The creation of an entire decisional mechanism involving the agency in greatly increased ongoing activities merely for this purpose is not justified.

VIII. GTE recommends bifurcation of liability and damages issues.

The Notice at page 6 addresses "7. Damages."

GTE recommends bifurcation of damage and liability questions. There is ample precedent for this approach, which is commonly employed in agency and court proceedings. It allows for the parties to reach a settlement once liability is established.

And it makes it more likely that some resolution can be accomplished on an accelerated schedule.

Respectfully submitted,

GTE Service Corporation on behalf of its affiliated domestic telecommunications companies

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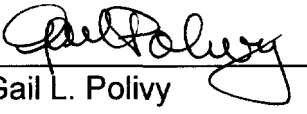
By 

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Certificate of Service

I, Judy R. Quinlan, hereby certify that copies of the foregoing "GTE's Comments" have been mailed by first class United States mail, postage prepaid, on January 12, 1998 to all parties of record.

Judy R. Quinlan